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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

MEMORANDUM OF THE STATE OF LOUISIANA IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS

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MEMORANDUM OF THE STATE OF LOUISIANA IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS

Pursuant to Rule 16.5, appellant State of Louisiana, *ex rel.* William J. Guste, Jr., Attorney General of the State of Louisiana, files this Memorandum in Opposition to the appellee United States' Motion to Dismiss.

I. BOTH THE ORIGINAL AND AMENDED COMPLAINT SOUGHT TO INTERPOSE THE CONSTITUTION AGAINST ADMINISTRATIVE ENFORCEMENT OF AN ALLEGED STATE-WIDE POLICY OF RACIAL SEGREGATION IN LOUISIANA HIGHER EDUCATION. AS SUCH, A THREE-JUDGE COURT WAS REQUIRED AND THIS COURT HAS JURISDICTION ON DIRECT APPEAL.

First. It is sufficient, we respectfully submit, to refer to the Government's original complaint, filed fifteen years ago, by way of refuting the Solicitor General's belated plea of want of jurisdiction on direct appeal here. Surely the Government's contention that a three-judge court was improperly convened is anomalous at best, since it was the United States which initially opened the door to a three-judge court in 1974 when the complaint was filed. "At that time the Government seemed to have no doubt that it sought to enjoin the enforcement of a state statute on grounds of its unconstitutionality within the meaning of § 2281." *Washington v. Confederated Tribes*, 447 U.S. 134, 146 n.20 (1980).

A. The Original Complaint, App. 154a-163a, charges that various named state agencies responsible for the governance of all public institutions of higher education in the State of Louisiana, "have the collective responsibility under Louisiana law of operating the Louisiana statewide system of public higher education." ¶ 12, App. 157a. The Government's complaint repeatedly invokes the Fourteenth Amendment, ¶¶ 1, 17, 24, 27, by way of condemning specifically recited enabling legislation, *e.g.*, Louisiana Acts of 1972, No. 712 § 1, Complaint ¶ 10, App. 156a; legislatively sanctioned administrative enforcement decisions regarding construction of facilities, ¶ 22, App.

161a; and adoption by the defendant Louisiana Coordinating Council for Higher Education of its *Master Plan Toward Balanced Growth in Louisiana Posthigh School Education*, ¶ 24, App. 162a. According to the express terms of the Original Complaint, ¶ 24, App. 162a:

> "The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based on race, and thereby deprive black students attending State supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Title VI of the Civil Rights Act of 1964 and the regulations issued pursuant thereto."

These allegations require the convening of a three-judge court under the controlling decisions of this Court.

1. The Solicitor General blithely ignores this Court's summary affirmance in *Alabama State Teachers Assn. v. Alabama Public School and College Authority*, 393 U.S. 400 (1969), which conclusively sustains jurisdiction here on direct appeal. As in *ASTA*, the complaint in the instant case "dealt with the operation of a state-wide racial segregation regime," 393 U.S. at 400, under "legislative direction . . . expressive of an official, statewide policy to maintain a racially identifiable dual system of [higher] education," *Board of Regents of the University of Texas v. New Left Education Project*, 404 U.S. 541, 544 n.2 (1972). *Board of Visitors v. Norris*, 404 U.S. 907 (1972), *aff'g* 327 F. Supp. 1368 (E.D. Va. 1971), rests upon the same basis.

ASTA, we submit, controls here. The Government was right when it asked for a three-judge court in 1974; it is wrong to move to dismiss today after fifteen years' expenditure of judicial time and lawyer energy.

Second. The Solicitor General says, Motion to Dismiss, p. 18, n.22, "the complaint here plainly did not 'alleg[e] that the implementation of Louisiana statutes and sections of the Louisiana Constitution violated Title VI and the Fourteenth Amendment.'" Surely this is a false

characterization of the controversy between the United States and Louisiana, given the allegations of the Government's own original and amended complaint. We hardly need remind this Court of Justice Brandeis's keen admonition that, "A party's conception or characterization of the question presented by the record is, of course, not conclusive of his right to review. The right is determined by the record." *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 296 (1921) (Brandeis, J., dissenting).

Fifteen years ago it was crystal clear to the Government that a three-judge court was required. Here is what the Government said in its own MEMORANDUM IN SUPPORT OF REQUEST FOR A THREE-JUDGE COURT, App. 186a n.5:

> "The complaint filed by the United States . . . is an action to insure that the *operation of the statewide system of public higher education throughout the State of Louisiana complies with* the requirements of Title VI of the Civil Rights Act of 1964, the regulations of the Department of Health, Education and Welfare issued pursuant to Title VI, and *the Fourteenth Amendment to the United States Constitution.* As outlined in paragraphs three through eleven of the Complaint, the State of Louisiana and its agents exercise the collective responsibility under Louisiana law for the control, supervision and operation of all institutions of higher education within the State. In this capacity, *the defendants and their agents have proposed and implemented policies, practices and regulations pursuant to their statutory authority which have maintained and perpetuated an unlawful statewide dual system of public higher education on the basis of race.* The government seeks injunctive relief against the defendants, their agents, officers, employees, successors and all persons in active concert with them from maintaining and perpetuating racial dualism in the State supported system of higher education throughout the State of Louisiana." (Emphasis added.)

Fifteen years ago it was clear to the United States—as it remains clear to Louisiana today—that the Govern-

ment's complaint attacked "the operation of the statewide system of higher education as being racially discriminatory." MEMORANDUM IN SUPPORT, App. 188a. And the Government's MEMORANDUM properly invoked this Court's decision in *Board of Regents of the University of Texas v. New Left Education Project*, 404 U.S. 541 (1971), in support of its request for a three-judge court since the Government's complaint against Louisiana "challenges a statewide statute, policy, practice or regulation as applied and further seeks relief which . . . may require changes throughout the State system of higher education." MEMORANDUM IN SUPPORT OF REQUEST FOR A THREE-JUDGE COURT, App. 186a. A three-judge court was required, according to the Government, because the complaint challenged "action . . . 'expressive of an official, statewide policy to maintain a racially identifiable, dual system of education,'" MEMORANDUM IN SUPPORT, App. 190a, quoting *Board of Regents*, *supra*, p. 544 n.2.

While the Government is free to change its mind, or its litigation strategy, this Court is not free to ignore the mandate of § 2281 as authoritatively construed by this Court. With all due respect, the current Solicitor General's post-hoc reinterpretation of the Government's 1974 complaint should be given no weight by this Court. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 422 (1971) (opinion of Justice Hugo Black) (rejecting "too-late formulations, apparently coming from the SOLICITOR GENERAL'S office"). Surely in the case at bar,

> "the Solicitor General's representations are flatly inconsistent with the Government's own position at trial; they reflect nothing but a change in the Government's litigation strategy. This is precisely the sort of post-hoc rationalization that is entitled to no weight."

Jean v. Nelson, 472 U.S. 846, 866 n.5 (1985) (Marshall, J., joined by Brennan, J., dissenting).

Third. As to the mandate of § 2281, there is no need here to write a treatise. The controlling principles are clear enough from the cases.

A. Both the Original Complaint, ¶¶ 20, 24, App. 159a, 162a, and the Amended Complaint, ¶¶ 28, 33, 24, App. 173a, attack specified acts and practices of the defendant state agencies taken "Pursuant to State law," App. 162a, 176a, as violative of the Fourteenth Amendment. The Government's complaint, as characterized by the Government itself, "challenges a statewide statute, policy, practice or regulation *as applied* and further seeks relief which (4) may require changes throughout the State system of higher education." MEMORANDUM IN SUPPORT OF THE REQUEST FOR A THREE-JUDGE COURT, App. 186a (emphasis supplied).[1] These allegations plainly warrant convening a three-judge court under § 2281:

> "Section 2281 of 28 U.S.C. requires that a three-judge court be convened in any case in which a preliminary or permanent injunction is sought to restrain 'the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . .'"

Moody v. Flowers, 387 U.S. 97, 101 (1967). Again:

> "Our decisions have interpreted § 2281 to require the convening of a three-judge court 'where the challenged statute or regulation, albeit created or authorized by a state legislature, has statewide application or effectuates a statewide policy.'"

Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 64 (1978), quoting *Board of Regents v. New Left Education Project*, 404 U.S. 541, 542 (1972). And more:

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[1] During Dean Griswold's tenure as Solicitor General, there was no doubt that "an attempt to enjoin the enforcement of a statute on the ground that it is unconstitutional *as applied* may prompt the convening of a three-judge court," Brief for Appellees, *Flast v. Cohen*, 392 U.S. 83 (1968) (emphasis added).

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases."

Phillips v. United States, 312 U.S. 246, 251 (1941).

Long ago this Court held, faithful to the full text of the Expediting Act, that suits seeking to enjoin orders of administrative boards issued pursuant to state law require a three-judge court and direct appeal here. The Government's Motion to Dismiss, p. 3, n.3, fatally ignores the full text of § 2281,[2] its legislative history, and Congressional purpose: "The amendment seems to have been introduced to prevent any question that such orders were within the section. . . . But it plainly was intended to enlarge not to restrict the law." *Oklahoma Gas Co. v. Russell*, 261 U.S. 290, 292 (1923) (per Holmes, J.).

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[2] The Solicitor General's quotation of § 2281, Motion to Dismiss, p. 3, n.3, omits an important provision of the statute which came into the law in 1913. See Act of March 14, 1913, ch. 160, 37 Stat. 1013. As explained by Justice Holmes for this Court:

> "The amendment inserted after the words 'enforcement or execution of such statute' the words *'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State'* but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed repeatedly that the section was to be taken more broadly."

Oklahoma Gas Co. v. Russell, 261 U.S. 290, 292 (1923) (emphasis added).

Accord, Ex parte Collins, 277 U.S. 565, 566 (1928); *Alabama Comm'n v. Southern R. Co.*, 341 U.S. 341, 343-44 n.3 (1951) ("The word 'statute' [in § 2281] comprehends all state legislative enactments, including those expressed through administrative orders.").

There is no claim here, as there was in *Phillips v. United States, supra*, that the challenged acts and practices of the defendant state boards are ultra vires. What the Government claims here is that

> "Pursuant to State law, defendant Louisiana Board of Regents has developed, and proceeded to implement, a document entitled *The Master Plan for Higher Education in Louisiana*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana."

Amended Complaint, ¶ 33, App. 176a. This allegation alone requires a three-judge court under the rule of *Query v. United States*, 316 U.S. 486, 489 (1942). In *Query*,

> "the complainant sought to restrain the state officers from enforcing a state statute on the score of unconstitutionality of its threatened application. Accordingly, the requirement of a three-judge court applied."

Kesler v. Dept. of Public Safety, 369 U.S. 153, 157 (1962) (citation omitted). *Accord, Flast v. Cohen*, 392 U.S. 83, 89 (1968) ("The injunctive relief sought . . . extends to *any* program that would have the unconstitutional features alleged in the complaint.") (emphasis in original). That is precisely the situation here. See also *Sterling v. Constantin*, 287 U.S. 378, 393 (1932) ("As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor was challenged, the application for injunction was properly heard by three judges.") (per Hughes, C.J.).

We pause to note that the *Query* rule, which has apparently escaped the Solicitor General's notice, has been

followed in an unbroken line of decisions by this Court, *viz.*: *Flast v. Cohen*, 392 U.S. 83, 89 (1968); *Turner v. Fouche*, 396 U.S. 346, 353-54 n.10 (1970); *Washington v. Confederated Tribes*, 447 U.S. 134, 149 n.23 (1980).

B. Relying on *Morales v. Thurman*, 430 U.S. 322 (1977), the Solicitor General says, Motion to Dismiss, p. 17, "a Constitutional challenge to a state actor's practice is not equivalent to the type of action seeking to enjoin implementation (or enforcement) of an allegedly unconstitutional state statute that calls for a three-judge court under Section 2281." This is only a half-truth as we have demonstrated above. The Solicitor General's proposed distinction between attacks on statutes and attacks upon the results of their administration

> "overlooks the line, delineated by our past decisions, that falls between a petition for injunction on the ground of the unconstitutionality of a *statute*, either on its face or as applied, which requires a three-judge court, and a petition seeking an injunction on the ground of the unconstitutionality of the *result* obtained by the use of a statute not attacked as unconstitutional."

Turner v. Fouche, supra, at 353-54 n.10. If the result obtained is allegedly "Pursuant to State law," as the Government's complaint charged here, a three-judge court is required. *Id.* at 354 n.10, citing *Query v. United States.*

The short answer to the Solicitor General's reliance on *Morales* and *Costello v. Wainwright*, 430 U.S. 325 (1977), is that they have nothing to do with the jurisdictional question presented by the record here. The Original and Amended Complaints of two U.S. Attorneys General and the Justice Department's own MEMORANDUM IN SUPPORT OF A THREE-JUDGE COURT speak loudly in favor of a three-judge court. The United States should be kept to its earlier word:

> "The three-judge requirement was enacted to protect the States, not plaintiffs; if in substance the case is

> within the requirement, the statute should not be frustrated by a form of words."

Currie, *The Three-Judge District Court in Constitutional Litigation*, 23 Univ. Chi. L. Rev. 1, 39 (1964).

Fourth. Limitations of space permit only a fleeting reference to the legislative history of the three-judge requirement and the purpose of the Expediting Act. If ever there was a case of "special importance and requiring special treatment in the interest of the public," *Ex parte Collins, supra*, at 567, this is it. As we have shown in our Jurisdictional Statement, the issues in this case are certainly of "unusual gravity," to use Justice Brandeis's guiding expression. *Id.* at 569. Requiring the merger of LSU and Southern University Law Centers without a hearing is a grave matter,[3] to say nothing of the district court's order dismantling Louisiana's higher education governing boards protected by the State Constitution.

Complaints of unconstitutional race discrimination in statewide educational systems are the grist of three-judge courts and direct appeal. See, *e.g.*, *ASTA, supra*; *Norris, supra*; *McLaurin v. State Regents*, 339 U.S. 637 (1950). Threatened dislocation of state control over education—here the virtual destruction of Louisiana's constitutionally mandated system of higher education by federal equity decree—plainly calls into play the safety valve of the three-judge court and direct appeal. "[W]hatever need there was for a direct appeal to avoid abuse of the injunction in 1910 and 1937 seems still to exist. Race-relations . . . cases, in particular, have caused a good deal of friction between the states and the courts." Currie, *supra*, at 75. Plainly friction between the proper bounds of federal equity jurisdiction and state sovereignty lies at the heart of this case.

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[3] The United States has announced its opposition to the merger order: "We will challenge the district court's order requiring the merger of the Southern and LSU Law Center." Motion to Dismiss, p. 19, n.23.

Fifth and finally. We are in complete accord with the Solicitor General when he says, "in light of the importance of an expeditous decision on the merits of the underlying controversy, we urge the Court not to postpone ruling on this issue." Motion to Dismiss, p. 14, n.19. But, as we have shown, the question of this Court's jurisdiction on direct appeal here is not even close. As framed by the Government complaint, this case was " 'indubitably within [§ 2281].' " *Florida Lime Growers v. Jacobsen*, 362 U.S. 73, 82 n.8 (1960), quoting *Phillips v. United States*, 312 U.S. at 253. It would plainly contravene a major purpose of the Expediting Act [4] to delay this litigation further by remitting the parties to the Fifth Circuit.[5]

This Court should resolve the conflict between *ASTA* and *Norris* now, lest Louisiana's system of higher education be left in chaos for years.

CONCLUSION

For the foregoing additional reasons, the Court should note probable jurisdiction in the present case.[6]

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[4] Congress established three-judge courts as early as 1903, Act of February 11, 1903, ch. 544, § 1, 32 Stat. 823, "to expedite litigation of great and general importance." 36 CONG. REC. 1679 (1903) (Senator Fairbanks). See also *Swift & Co. v. Wickham*, 382 U.S. 111, 124 (1965):

> "The purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation is delayed while the proper composition of the tribunal is litigated."

[5] In the Forest Hill School desegregation case involving the closure of two public schools in rural Louisiana, the Fifth Circuit took twenty months to decide the case. See *Valley v. Rapides Parish School Board*, 702 F.2d 1221 (5th Cir. 1983).

[6] If the Court determines to dismiss the State of Louisiana's appeal on jurisdictional grounds, the Court should maintain its stay of the district court's order, pursuant to the All Writs Act, 28 U.S.C. § 1651, during the pendency of the appeal in the Fifth Circuit. On this point, Louisiana's Attorney General insists upon his exclusive perogative to represent the State of Louisiana at the Bar of this Court, and he disagrees entirely with the representations of Governor Roemer's counsel on the matter of the stay.

Respectfully submitted,

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